Uniphone Sdn Bhd v Chin Boon Lit & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-22-232 OF 1994
KAMALANATHAN RATNAM JC
5 DECEMBER 1997

Tort *— Negligence — Negligent publication — Duty of care — Publication of true statement in newspaper causing damage to plaintiff — Whether publisher owes duty of care to plaintiff*

Tort *— Negligence — Negligent publication — Parties admits to the truth of statement published — Whether truth can be an absolute defence in negligence*

Tort *— Negligence — Negligent publication — Foreseeability — Damage had already been done — Whether it was still foreseeable*

The plaintiff was a manufacturer and operator of public telephones using telephone cards. The first and second defendants were the editor and the proprietor of a newspaper called 'New Life Post' ('the Post'). The defendants published an article ('the article') in the Post which narrated in detail a method by which discarded telephone cards were used to make free phone calls from public telephone booths. Whilst admitting to the truth of the contents of the article, the plaintiff contended that the defendants had by the publication breached their duty of care to the plaintiff causing damages to the latter. The plaintiff further alleged that the defendants ought to reasonably foresee the loss that would be suffered by the plaintiff by the publicaiton of the article. On the other hand, the defendants submitted that they owed no duty of care to the plaintiff and that the publication was grounded on public interest.

Held, dismissing the claim:

(1) Before the issue of foreseeability of the loss can be considered, the plaintiff had to establish that the defendants owed it a duty of care (see p 445B). However, even in the issue of foreseeability, the plaintiff must fail. The damage had already been done; it was no more foreseeable. Since the damage was already done, the publication by the defendants of the step by step process could not be 'foreseeable' any longer (see p 446D).

(2) On the issue of proximity, the plaintiff could not be proximate as to fall within the neighbour principle. Furthermore, it was not fair nor just nor reasonable to impose upon the defendants the cumbersome burden of a duty of care when in fact, moved by the urge to be public-spirited, the defendants had ventured to expose the fraud (see p 446E–F).

(3) The tort of negligence ought not to restrict the freedom of speech, and restrain publishing statements which are true. It ought not to be the law that a person cannot make a statement which is true if it is foreseeable that the making of that statement

could cause loss to a third party who admits to the truth of that statement. Thus there is no reason why truth cannot be an absolute defence in negligence (see pp 446G–H and 447C–D).

[Bahasa Malaysia summary

Plaintif merupakan pengeluar dan pengendali telefon awam yang menggunakan kad telefon. Defendan-defendan pertama dan kedua adalah penyunting dan tuan punya suratkhabar yang digelar 'New Life Post' ('suratkhabar tersebut'). Defendan-defendan telah menerbitkan rencana ('rencana tersebut') dalam suratkhabar tersebut yang mengisahkan secara terperinci cara bagaimana kad telefon yang dibuang digunakan untuk membuat panggilan telefon percuma dari pondok telefon awam. Sambil mengakui kebenaran kandungan rencana tersebut, plaintif berhujah bahawa defendan-defendan telah melanggar kewajipan berjaga-jaga terhadap plaintif justeru itu menyebabkan kerugian kepada plaintif. Plaintif selanjutnya mengatakan bahawa defendan-defendan sepatutnya boleh meramalkan secara munasabah kerugian yang akan ditanggung oleh plaintif akibat penerbitan rencana tersebut. Sebaliknya, defendan-defendan menghujah bahawa mereka tidak mempunyai kewajipan berjaga-jaga terhadap plaintif dan bahawa penerbitan itu adalah berdasarkan kepentingan awam.

Diputuskan, menolak tuntutan:

(1) Sebelum isu kebolehramalan kerugian boleh dipertimbangkan, plaintif hendaklah membuktikan bahawa defendan-defendan mempunyai kewajipan berjaga-jaga terhadapnya (lihat ms 445B). Namun demikian, sekalipun dalam isu kebolehramalan, plaintif mestilah gagal. Kerosakan telah pun terjadi; ia tidak lagi boleh diramal. Oleh kerana kerosakan telah pun terjadi, penerbitan proses langkah demi langkah oleh defendan-defendan tidak lagi 'boleh diramal' (lihat ms 446D).

(2) Mengenai isu kedekatan, plaintif tidak mungkin dekat hinggakan dirangkumi oleh prinsip jiran. Tambahan pula, adalah tidak adil atau pun munasabah untuk mengenakan beban kewajipan berjaga-jaga ke atas defendan-defendan walhal pada hakikatnya, defendan-defendan telah berusaha mendedahkan fraud itu didorong oleh semangat mengambil berat tentang orang ramai (lihat ms 446E–F).

(3) Tort kecuaian tidak patut membendung kebebasan bercakap, dan menahan penerbitan kenyataan yang benar. Ia tidak sepatutnya menjadi undang-undang bahawa seseorang tidak boleh membuat kenyataan yang benar andainya ia boleh diramalkan bahawa pembuatan kenyataan itu boleh menyebabkan kerugian kepada pihak ketiga yang mengakui kebenaran kenyataan tersebut. Justeru itu, tiada sebab mengapa kebenaran tidak boleh menjadi pembelaan mutlak dalam kecuaian (lihat ms 446G–H dan 447C–D).]

Notes

For cases on negligence generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 315–852.

Cases referred to

Bell-Booth Group Ltd v Attorney General [1989] 3 NZLR 148 (refd)
Caparo Industries Plc v Dickman & Ors [1990] 2 AC 605 (refd)
Deyong v Shenburn [1946] KB 227 (refd)
Donoghue v Stevenson [1932] AC 56 (refd)
Grant v Australian Knitting Mills Ltd & Ors [1936] AC 85 (refd)
Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1985] AC 210 (refd)
Yuen Kun-Yeu & Ors v A-G of Hong Kong [1987] 2 All ER 705 (refd)

Legislation referred to

Telecommunications Act 1950 s 3

Joseph Yeo (*AJ Ariffin Yeo & Harpal*) for the plaintiff.
Nitin V Nadkarni (*Lee Hishamuddin*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam JC:

The facts

At all material times, the plaintiff was a manufacturer and operator of public telephones, using telephone cards, with the approval of the Minister of Energy, Telecommunications and Post, in accordance with s 3 of the Telecommunications Act 1950. The first defendant was the editor and the second defendant the proprietor of a newspaper called 'New Life Post' ('the Post'). On 15 May 1993, the defendants published an article in the Post.

The publication

The publication was headlined thus:

> Old Cards Revived as New
> Engaged In Long Telephone Calls For Free

In a nutshell, the said publication narrated how a group of technical college students discovered a method by which old disused and discarded telephone cards which had had face values of up to RM50 were used to make free phone calls from public telephone booths which used pay-cards. In addition to stating this, the defendants went on to narrate in detail the step by step manner in which the free calls were made.

The plaintiff's case

Whilst admitting to the truth of the contents of the said publication, the plaintiff contended that in consequence of the publication of the said article, it had suffered loss in the sale of telephone cards because the owners of the disused telephone cards were using the same old cards without purchasing fresh cards. The plaintiff therefore contended that since the Post had a wide readership, the defendants had in fact by the said publication breached their duty of care to the plaintiff. The claim was thus founded on negligence and particulars of negligence were pleaded. The plaintiff claimed general and exemplary damages and special damages amounting to RM940,965.20 with interest and costs.

The defendants' case

The defence was simple. They contended that they owed no duty of care to the plaintiff and that the said publication was grounded on public interest and to expose the improprieties of the college students.

Prior agreement of parties

At the commencement of the case, parties had agreed that I ought to only determine the issue of liability. The question of damages was to arise only if liability was established against the defendants. The parties further agreed that they would adduce no evidence and that they would merely tender written submissions.

Is there a duty of care?

The onus of proving its case is always with the plaintiff. For negligence to be the basis of its case, the plaintiff must satisfy the court that there existed a duty of care owed to it by the defendants, that there was a breach of that duty, and that as a result of that breach, the plaintiff had suffered loss and damage which ought to have been foreseeable by the defendants and that that loss and damage in any case was not too remote.

The plaintiff's case is grounded solely on negligence. There is no claim for defamation, nor for negligent misstatement. The question therefore is whether by publishing the impugned article, it can be said that the defendants had acted negligently.

The truth of the article

The plaintiff does not dispute the fact that the article is true. Indeed, it is the essence of its claim that the article is true. The plaintiff has also conceded in its submission that the defendants had a duty to publish the fact that the plaintiff was being defrauded. However, the plaintiff contended that there was no need for the defendants to have given the full details of the way in which the plaintiff was being defrauded because by so doing others were being encouraged to follow suit. It was the plaintiff's view that

A the defendants ought to have at least waited until the plaintiff had devised a way to rectify the situation. The plaintiff's stand is that a duty of care arose out of the ability of the defendants to reasonably foresee the loss that would be suffered by the plaintiff if the article was published. To my mind, this is putting the cart before the horse. The foreseeability is in respect of the loss but before the issue of the loss can be considered, the plaintiff has to establish that the defendants owe it a duty of care. Whilst I accept the fact that the categories of negligence are never closed, as such categories grow and develop with the ever developing facets of life and law, I cannot accept the proposition that the 'love your neighbour' principle and that the question who then is your neighbour, being answered by the expression 'the man in the Intrakota bus', could be so extended as to hold the defendants liable to the plaintiff. For the defendants to be liable in negligence, it must first be established that they had a duty to the plaintiff not to publish the information, and that in breaching that duty, they had breached their duty of care. It is pertinent to repeat the words of Lord Wright who said in the decision of the Privy Council in *Grant v Australian Knitting Mills Ltd & Ors* [1936] AC 85 at p 103:

> It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.

Echoing similar sentiments Du Parcq LJ said in *Deyong v Shenburn* [1946] KB 227 at p 233:

> ... It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is much too wide. There has to be a breach of a duty which the law recognizes, and to ascertain what the law recognizes regard must be had to the decisions of the courts.

In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, Lord Keith of Kinkel said in the House of Lords at p 240:

> ... The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.

The reference to Lord Atkin's speech was his speech in *Donoghue v Stevenson* [1932] AC 562. The decision in *Peabody Donation Fund* was followed by the Privy Council in *Yuen Kun-Yeu & Ors v A-G of Hong Kong* [1987] 2 All ER 705. In *Caparo Industries Plc v Dickman & Ors* [1990] 2 AC 605, the House of Lords distilled the essence obtained from the earlier cited cases to establish a duty of care by interlocking three criteria for the court to consider, namely:

(i) foreseeability of damage;

(ii) proximity of relationship; and

(iii) whether in all the circumstances it is fair, just and reasonable to impose a duty.

Applying these tests, I find that even in the issue of foreseeability, the plaintiff must fail. The damage had already been done. It is no more foreseeable. The article when read in its full context says that the knowledge of the step by step process of using the telephone card to make the free calls was so wide-spread amongst the college students that it was 'like wrapping fire in paper'. Since the damage was already done, the publication by the defendants of the step by step process cannot be 'foreseeable' any longer. On the issue of proximity, the plaintiff cannot be proximate as to fall within the neighbour principle. In any case, the publication had reached out to the public at large to warn it to be on the look out for long queues of college students at any public pay-card phones. If in the course of such warning the plaintiff is affected, then in any case the third interlocking facet would render impotent any sting attached to the duty of care; for it is not fair nor just nor reasonable to impose upon the defendants the cumbersome burden of a duty of care when in fact, moved by the urge to be public-spirited, the defendants had ventured to expose the fraud.

It is my judgment that on this first issue of establishing the fact that the defendants owed it a duty of care, the plaintiff had failed. I need not therefore labour the other issues.

Is truth a defence in negligence?

It is my judgment that the tort of negligence ought not to restrict the freedom of speech, and restrain publishing statements which are true. It ought not to be the law that a person cannot make a statement which is true if it is foreseeable that the making of that statement could cause loss to a third party who admits to the truth of that statement.

To illustrate, assuming the vault of a bank is tunneled into by a gang of robbers in the wee hours of the night and over the weekend and assuming that story is vividly reported in detail in the press, and if the argument of the plaintiff is to be accepted, each and every bank in the country will have a cause of action against the newspapers for breaching their duty of care because the very act of reporting in graphic detail the story of the tunnelling can be construed as an invitation to future gangs of robbers to adopt a similar modus operandi. In *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148, the court considered, inter alia,

whether a true statement could give rise to a claim in negligence. As in the case before me, the plaintiff complained, not with the truth of the statement, but with the way in which it was published. The New Zealand Court of Appeal dismissed the claim. In delivering the judgment of the court, Cooke P said at p 156:

> ... The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.

It is my judgment that public policy dictates that the tort of negligence ought not to be allowed to reach out to stamp its mark of Cain on defendants who make statements which are true and which statements have been accepted as true by the party complaining of sufferance. After all, even if in the tort of defamation, truth as in justification and fair comment can be credible defences, I see no reason why truth cannot be an absolute defence in negligence.

The plaintiff's claim is dismissed with costs.

Claim dismissed with costs.

Reported by Loo Lai Mee